

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Date:
November 22, 2021

LEGEND:

Taxpayer =

Accounting Firm =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Year 1 =

Year 2 =

Year 3 =

a =

b =

Dear :

This ruling responds to a letter dated May 26, 2021, and subsequent correspondence, submitted on behalf of Taxpayer. Taxpayer requests a ruling granting an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations (the "Regulations") to make a determination under section 860(e)(4) of the Internal Revenue Code (the "Code") for the taxable year that ended Date 1 (the "Year 1 Tax Year").

FACTS

Taxpayer was formed on Date 2, as a C corporation. In Year 2, Taxpayer made an election under section 856 of the Code to be treated as a real estate investment trust ("REIT") for federal income tax purposes. Taxpayer invests in various partnerships that develop and own condominiums and hotels. Taxpayer's taxable year is the calendar year.

At the beginning of each calendar year, Taxpayer works with its tax advisor, Accounting Firm, on Form 1099-DIV statements issued to shareholders and on cash-flow projections. In early Year 1, Taxpayer's Tax Director ("Tax Director") informed Accounting Firm that Taxpayer would distribute at least 90 percent of Taxpayer's Year 1 taxable income to shareholders through regular monthly distributions.

In Date 3, Tax Director contacted Accounting Firm for advice related to a large unanticipated gain Taxpayer would be recognizing in Year 1. Tax Director was concerned that the payment of regular monthly dividends would not be sufficient to distribute at least 90 percent of Taxpayer's Year 1 taxable income. To address this situation, Accounting Firm informed Tax Director about the option of making an election under section 858(a) to carry back to Year 1 dividends that are actually distributed in Year 3, provided that the dividends are declared by the extended due date of the Year 1 return (Date 4), and paid by the end of Year 3. Tax Director and Accounting Firm concluded that Taxpayer would have sufficient distributions during Year 3 to be in a position to carry back a portion of those dividends to Year 1 by making a section 858(a) election (the "Section 858 Dividends"). Tax Director then informed Taxpayer's

executives that Taxpayer could make a section 858(a) election to adequately cover the Year 1 dividend distribution shortfall. Tax Director, however, incorrectly informed Taxpayer's executives that Section 858 Dividends only needed to be declared by Date 5.

On Date 6, Taxpayer's Board of Directors (the "Board") met to discuss concerns regarding the preservation of Taxpayer's liquidity in light of business uncertainty caused by the onset of the COVID-19 pandemic. Among other measures, the Board voted to suspend monthly dividends.

Taxpayer filed by the extended due date of Date 4, Taxpayer's Form 1120-REIT for the Year 1 Tax Year (the "Tax Return"). On the Tax Return, Taxpayer made an election under section 858(a) to treat a of Year 3 dividend distributions as having been paid in Year 1 in order to cover the Year 1 distribution shortfall. On Date 7, the Board declared a special dividend of b. The Board intended a portion of the special dividend to cover the Year 1 distribution shortfall. On Date 8, the special dividend was distributed to shareholders.

During a meeting in late Date 9, Accounting Firm and Taxpayer discovered that Taxpayer failed to timely declare and distribute the Section 858 Dividends. As a result, the section 858(a) election for the Year 1 Tax Year made on the Tax Return was not valid because the Section 858 Dividends had to be declared no later than Date 4, and distributed by Date 5.

Taxpayer requested Accounting Firm to research options to rectify the problem. Accounting Firm determined that the best option was to request relief to make a determination under section 860(e)(4) effective for the Year 1 Tax Year. Accordingly, Taxpayer submitted a request for a ruling under sections 301.9100-1 and 301.9100-3 seeking an extension of time to file with the Internal Revenue Service (the "Service") the necessary forms to make a determination under section 860(e)(4) for the Year 1 Tax Year.

Taxpayer makes the following additional representations in connection with its request for an extension of time:

1. The request for relief was filed before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief requested will not result in Taxpayer having a lower U.S. federal tax liability in the aggregate for all years to which the election applies than it would have had if the election had been timely made (taking into account the time value of money).
3. Taxpayer does not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code at the

time it requested relief and the new position requires or permits a regulatory election for which relief is requested.

4. Being fully informed of the required regulatory election and related tax consequences, Taxpayer did not choose to not file the election.
5. Taxpayer is not using hindsight in making the decision to seek the relief requested. No specific facts have changed since the due date for making the election that make the election advantageous to Taxpayer.
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer for the taxable year in which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had it been timely filed.

In addition, affidavits on behalf of Taxpayer have been provided as required by section 301.9100-3(e).

LAW AND ANALYSIS

Section 860(a) generally provides that if a determination with respect to any qualified investment entity results in any adjustment for any taxable year, a deduction shall be allowed to such entity for the amount of deficiency dividends for purposes of determining the deduction for dividends paid (for purposes of section 852 or section 857, whichever applies) for such year. Section 860(b)(2) provides that the term “qualified investment entity” includes a real estate investment trust.

Section 860(e)(4) provides that the term “determination” includes a statement by the taxpayer attached to its amendment or supplement to a return of tax for the relevant tax year.

Section 860(f)(1) provides, in part, that no distribution of property shall be considered as deficiency dividends for purposes of section 860(a) unless distributed within 90 days after the determination, and unless a claim for a deficiency dividend deduction with respect to such distribution is filed pursuant to section 860(g).

Section 860(g) provides that no deficiency dividend deduction shall be allowed under section 860(a) unless (under regulations prescribed by the Secretary) claim therefor is filed within 120 days after the date of the determination. Section 1.860-2(b)(2) of the Income Tax Regulations provides that the claim required by section 860(g) shall be made on Form 976 (*Claim for Deficiency Dividends Deductions by a Personal Holding Company, Regulated Investment Company, or Real Estate Investment Trust*).

Revenue Procedure 2009-28, 2009-20 I.R.B. 1011, provides procedures for a REIT to follow to make a self-determination under section 860(e)(4) for purposes of the

deficiency dividends procedures of section 860. Section 4.01(1) of Rev. Proc. 2009-28 provides that if a REIT properly completes Form 8927 (*Determination Under Section 860(e)(4) by a Qualified Investment Entity*) and files Form 8927 with the Service, in accordance with the applicable instructions, then that form will be treated for purposes of section 860(e)(4) as “a statement by the taxpayer attached to its amendment or supplement to a return of tax for the relevant tax year.”

Section 301.9100-1(c) of the Regulations provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements for an automatic extension under section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to section 301.9100-3 will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer generally is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under section 301.9100-3 before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith, however, if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be

prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under section 301-9100-3.

CONCLUSION

Based on the information submitted and representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to file Form 8927 to make a determination under section 860(e)(4) dated Date 8 for purposes of section 860(f)(1) and (g), and to file Form 976 to claim a deficiency dividend deduction under section 860(g) for the dividends distributed on Date 8 that relate to that determination. The Form 976 will be deemed filed on the last available filing day after the Date 8 date of determination, i.e. Date 10.¹ Consistent with this ruling, Taxpayer is granted a period of 90 calendar days from the date of this letter to file Forms 8927 and 976 with the Service.

This ruling is limited to the timeliness of the filing of Forms 8927 and 976. This ruling's application is limited to the facts, representations, and Code and Regulations sections cited herein.

Except as provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether Taxpayer otherwise qualifies as a REIT under section 856.

No opinion is expressed with regard to whether the tax liability of Taxpayer is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

¹ Section 860(g) provides that the claim must be filed within 120 days after the date of determination. However, section 7503 provides, in part, that when the last day for performing any act falls on a Saturday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and accompanied by penalties of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

K. Scott Brown
Senior Technician Reviewer, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosure:
Copy for section 6110 purposes

cc: